STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: MAY 16, 2023

IN THE MATTER OF:
Appeal Board No. 628068

PRESENT: MICHAEL T. GREASON, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective September 23, 2020, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to September 23, 2020 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held telephone conference hearings, including hearings pursuant to the Appeal Board's March 17, 2022 remand, at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the claimant and the employer. By decision filed January 31, 2023 (), the Administrative Law Judge sustained the initial determination.

The claimant appealed the Judge's decision to the Appeal Board.
Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant was employed as a traffic checker by the NYC MTA for nearly 13 years. During his employment, the claimant worked in a number of different departments in the traffic checker unit, which assigned checkers to various duties monitoring the city's bus and subway systems. Employees, including the claimant, were issued employee identification cards which also served as a MetroCard and were used by the employer to confirm that employees were arriving and leaving their assigned locations as scheduled. An employer memo dated February 22, 2017, addressed to "All Traffic Checking Employees" states, "This is a reminder that you are required to swipe your

EPIC pass (Employee Personal Identification Card) when arriving and departing from your work location during your tour of duty. In accordance with NYCT Rules and regulations, failure to adhere to this directive or to knowingly make false time record entries can result in disciplinary action." A memo dated July 1, 2019 and addressed to "All NYCT Fare Evasion Traffic Checkers" states, "Effective immediately, all Traffic Checkers assigned to the NYCT Fare Evasion unit must start and finish their assignments in accordance to (sic) the written time and direction that is indicated on their daily weekly schedules."

In October 2019, disciplinary charges were brought against the claimant. These charges related to conduct on eight dates in August and September 2019, when the claimant did not swipe his EPIC card upon arriving at his assigned stations. Thereafter, a "Stipulation and Agreement" was signed on January 10, 2020, which served as a final warning and provided, "any future similar conduct will result in Grievant being pre-disciplinary suspended pending dismissal."

On or about February 9, 2020, the claimant began working in the Fare Evasion division of the traffic checkers unit. As part of that training, the claimant received the February 22, 2017 memo, which was the basis for the 2019 disciplinary charges against him. The claimant was aware that if he made false entries on his written reports, his job would be in jeopardy.

In July 2020, the claimant was working full-time, five days a week, for seven hours a day. The claimant was to report to three assigned subway stations a day and remain at each station for one hour, during which time he was to record, in 6 minute intervals, the number of individuals who attempted to, or did, evade paying the fare by jumping the turnstile or "bumping" (2 individuals going through the turnstile at once). The claimant set his watch each day of work by the office clock, and proceeded to his assigned subway stations. Upon arrival, the claimant swiped his EPIC pass, recorded his arrival time in writing on a paper report, and began his observations, marking notations in 6-minute intervals for one hour. When his one-hour assignment was up, according to his watch, the claimant left the location, using his EPIC pass to swipe out.

In late July 2020, the claimant's supervisor, BD, observed inconsistencies between the claimant's written reports on July 2, 6, 16 (2 separate reports), 20, 26 (2 separate reports), and 27 (2 separate reports), 2020, and the EPIC

pass swipe times, including that on 7 of the 9 reports at issue, the claimant's EPIC pass "swipe out" time was 12 minutes prior to the scheduled end of his shift, 6 minutes before on one occasion, and 18 minutes before on one date. He also saw that the claimant's EPIC pass "swipe in" time was before the beginning of the claimant's shift on all but one date, when the "swipe in" time recorded was exactly the start time of the claimant's shift. Finally, BD observed that handwritten notations were made by the claimant on each sheet after the time that appeared as his EPIC "swipe out" time. BD reported his observations to the employer's compliance department, and reminded the claimant that he was required to "swipe" upon arriving and leaving an assigned location. On August 11, 2020, BD noticed that in the written report submitted by the claimant for that day, a few of the data collection fields were blank. BD told the claimant the form was incomplete, and reported this incident to the employee compliance department.

Following a review, the employer brought two disciplinary charges against the claimant for the July and August 2020 incidents. Specifically, the employer charged that on August 11, 2020, the claimant improperly performed his job when he left several data fields blank on a report; and that on the July dates at issue the claimant swiped out using his EPIC pass before the end of his assignment, and made handwritten entries after the recorded "swipe out" time. The employer concluded that all entries made after the claimant's EPIC pass

was swiped at the end of his shift were false, and that his whereabouts were unaccounted for the minutes between his EPIC pass swipe-out and his last recorded entry.

The claimant was suspended pending dismissal as a result of these charges, and he filed a grievance. An arbitration proceeding was held at which the claimant appeared with Union representation, and at which all parties were permitted to present witnesses and cross-examine the other party's witnesses, to testify under oath, and present other evidence. Representatives were given the chance to make closing statements. An arbitration decision was issued on November 9, 2020. The decision noted, among other things, that BD testified that there was no expectation that employees start their survey exactly at the time indicated on the form, and that arrival and departure times personally recorded by a traffic checker on the survey form should match the swipe records derived from his EPIC pass. The arbitrator's decision concluded that the employer proved the claimant "was guilty of nonperformance and improper documentation." The arbitrator stated that he arrived at that conclusion because he believed that

the claimant was aware that the employer expected him to use his EPIC pass exactly at the beginning and end of a survey. The arbitrator also found, based upon the claimant's admission, that the claimant did not complete his assignment on August 11, 2020 when he left certain fields of the form blank. The arbitrator found that the January 2020 warning applied to future performance infractions, and concluded that the employer had "just cause to discharge" the claimant.

After the arbitration proceeding and decision confirming the claimant's discharge, the claimant's Union learned that more than a dozen other traffic checkers were charged with discrepancies of either 6 or 12 minutes between their times personally recorded, and the records derived from their EPIC swipe passes, the same variance between the claimant's EPIC swipe and his handwritten notations. An investigation was conducted, and it was discovered that the iPad tablets given to traffic checkers were synced with the clock in the employer's office, which resulted in a time on the device that did not match the time that was displayed on the clock in the MTA booth and recorded on swipe passes, leading to the tablets indicating that it was time to leave to go to the next station, when it was actually 6 or 12 minutes before the station time which was recorded on their exit. The employer and its labor relations representative acknowledged that the employees charged were not stealing time or making false entries, they were just moving on when it appeared to be time to do so. Charges against all the other employees were dropped. Although the claimant did not use a tablet to record his observations, his watch was also synchronized to the clock in the employer's office.

OPINION: The credible evidence establishes that the claimant was discharged following an employer investigation into discrepancies on nine July 2020 data sheets between handwritten entries and times recorded when his EPIC pass was swiped at the end of his shift, and the employer's conclusion that the claimant had falsified his handwritten entries. The employer also concluded that on August 11, 2020, the claimant failed to complete the data form he submitted, leaving a few entries blank.

The issue of the claimant's conduct on the dates at issue came before an arbitrator after the claimant filed a grievance subsequent to his discharge. Pursuant to Matter of Ranni, 58 NY 2d 715, parties may not re-litigate factual issues already decided at a full hearing where the parties had a full and fair opportunity to be heard. In the case before the Board, the evidence

establishes that both parties were represented at the arbitration hearing, and had a full and affair opportunity to present their cases to the arbitrator. Accordingly, the Board is bound by any facts found therein, insofar as they pertain to the circumstances surrounding the claimant's separation from employment (see, Matter of Ranni, 58 NY2d 715 [1982], Matter of Ryan, 62 NY2d 494 [1984], and Matter of Guimarales, 68 NY2d 989 [1986]). However, while bound by the facts found by the arbitrator regarding the events leading to the claimant's discharge, the Board may make additional findings of fact not inconsistent with those of the arbitrator, and it is within the Board's jurisdiction to decide whether the conduct established at the arbitration hearing constitutes misconduct for unemployment insurance purposes (see, Matter of Lester, 149 AD2d 880 [3rd Dept, 1989] and Matter of Guimarales, 68 NY2d 989).

We are not convinced that the arbitrator in this matter made any actual findings of fact in his decision, but rather that he reached conclusions based upon facts presented by both sides. However, even if we were to find that those conclusions were based upon facts presented by the employer, and that were thus adopted by

the arbitrator, we do not find that the claimant's conduct disqualified him from receiving unemployment benefits.

With respect to the claimant's failure to fill in all data fields on the form he submitted on August 11, 2020, we find that such failure does not amount to misconduct. Despite the employer's contention that BD, testified fully on that issue, the witness provided no specifics about what information was either not completed or not completed properly, on the form submitted for that date. Further, the record does not establish that the claimant's omissions were intentional, rather than mere mistakes or poor job performance, neither of which amounts to misconduct. Accordingly, we find that omissions on the claimant's August 11, 2020 survey form were not intentional, and that any failure to complete the form was poor job performance, and not disqualifying.

Further, although we may be bound by a finding that the reports submitted by the claimant on the July dates at issue contained discrepancies, we may also make additional findings not inconsistent with the arbitrator's decision. Here, we note that the claimant and his Union representative offer facts that were not known at the time of the arbitration and therefore could not have been considered. Those facts establish that there was a difference between the

clock at the employer's offices, by which employees synchronized their time-keeping devices, and the subway station times as recorded on EPIC pass swipes. This difference resulted in employees, including the claimant, leaving stations according to the employer's office time, which was earlier-in multiples of 6 minutes-than the times recorded by the turnstile swipes. The credible, consistent testimony of this "glitch" was objected to by the employer at the unemployment hearings, but was not refuted.

We note that the employer was given multiple opportunities to disprove the claimant's contention that the subway station clocks and turnstiles were not synchronized to the clock in the employer's offices, by which the claimant set his personal watch, yet failed to do so. Further, and significantly, when specifically given the opportunity by the hearing Judge to refute that there was a glitch that might have resulted in the claimant's entries seeming to be incorrect or false, the employer's representative stated that the employer did not want to introduce evidence to refute the claimant's contention. Accordingly, we credit the claimant's credible and consistent testimony, and make the additional finding and conclusion that any discrepancies between the claimant's handwritten time notations and the EPIC pass swipe times were the result of the fact that the clock in the employer's office was not synchronized with the time-keeping mechanisms at the stations. This additional finding supports a conclusion that any discrepancies were not the result of the claimant's knowing and intentional conduct, and that notations that appear to have been made after the claimant "swiped out" using his EPIC pass, were not false.

Finally, to the extent that the employer requires its employees who are working at subway stations, to swipe at the exact minute their shifts start and end, we find that requirement to be unreasonable, given all the potential variables outside an employee's control that make the directive impossible to comply with. Accordingly, we find that on the dates at issue, the claimant did not engage in behavior that constitutes misconduct under the Labor Law, and we conclude that that the claimant was separated from employment under nondisqualifying circumstances.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determination, disqualifying the claimant from receiving benefits, effective September 23, 2020, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the

wages paid to the claimant by prior to September 23, 2020 cannot be used toward the establishment of a claim for benefits, is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

MICHAEL T. GREASON, MEMBER